

Water Grab #2 Province of Ontario's Plans to Transfer Local Water Systems and Services to the Private Sector: A Breach of the Public Trust?

A Review of Bills 175 and 195 (2002)

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Executive Summary:

This second in a series of three Case Studies builds upon the first that examined the City of Toronto's unsuccessful plans to change the governance structure of the present Department of Water and Wastewater Services into the Toronto Water Board, a Municipal Service Board pursuant to provincial legislation. That Study focused on the anticipated NAFTA and the GATS obligations likely triggered by the new designation of a public monopoly, including free trade in services and investor state disputes. This second Case Study relies upon the first but shifts to a review of two Bills pending before the Ontario legislature, the Safe Drinking Water Act (Bill 195) and the Sustainable Water and Sewage Act (Bill 175). The third and final Case Study examines what water resource and quality standards apply, in any event.

In addition to the trade aspects that flow from the governance change to local water system and services, this Study considers whether provincial legislative jurisdiction over water, water works and related services are also subject to a public trust, either under the Canadian constitution and/or by virtue of a provincial statute. In other words, is water and the effective access to it part of the commons? and if so, under what legislative authority or other public mandate would the current Progressive Conservative government proceed and what might be the implications for the wider public interest and environmental protection? The urgency of the matter is that if the provincial government is successful in transferring ownership of local water works and services to the private sector, then if there were a public trust, would it not be extinguished forever if reviewing courts found clear legislative intent to permit private property rights to attach to these public resources and assets?

The Public Trust Doctrine

It is argued that both the 1867 Constitution Act as well as the Ontario 1998 Environmental Bill of Rights recognize that the province holds non-renewable resources "subject to any Trusts", including a public trust, putting into doubt the lawful authority of the province to transfer the ownership and effective control of local water works and services to the private sector. Some may argue that even if there is a public trust, it is likely limited to the actual waters of the province, and does not extend to the water-related capital assets and operations. However, this position fails to consider the water system as a whole from extraction, to distribution, to waste water treatment and discharge. If the public loses the actual public access to and wise use of the water resource, the enjoyment of the public trust could be seriously diminished. According to current public trust doctrine, clear legislative intent, in addition to a public mandate, would likely be required to exhaust such a public trust. Possible legal strategies are considered to respond to this significant governance change directed from the province to the most precious of all exhaustible resources – water.

Given the irrevocable nature of the governance consequences that could flow from hasty decision-making and the lack of a clear public mandate to proceed with the transfer of ownership of local water systems, the series concludes that the public interest is best serviced by retaining public ownership in and effective access to and control of water resources and related water works and services. Based upon the risks that the Walkerton tragedy made clear and almost ten years of experience with NAFTA investor-state disputes, our preliminary

findings indicate the need for more public accountability, not less. We welcome a more thorough examination of the issues raised in this series and recommend that legal strategies be developed to test the authority of the current provincial government to proceed with legislating Bills 175 and 195. Recall that in July of 2002, the Ontario Superior Court found that the government had no authority to proceed with the \$5.5-billion sale of Hydro One under the Electricity Act, forcing the government to change its plans on privatization. Consideration might be given to seeking a declaration from the Ontario courts that the waters and related works and services are subject to a public trust and that clear legislative intent is required to extinguish it. It must be observed that this proceeding would need to be commenced BEFORE the Bills become law, **expected not later than December 12, 2002.** Having considered the provincial Bills 175 and 195 together with a comparative review of the public trust doctrine in Canada, the United Kingdom and the United States, our main findings are as follows:

Review of the Bills While Justice O'Connor in the Walkerton Inquiry observed the need for municipalities to ensure that their water systems and assets are adequately financed, all of these recommendations were premised upon continual municipal ownership. He saw no need for the provincial government to prescribe specific changes to the municipal governance or municipal ownership structure. He found most municipalities are well within their borrowing limit to publicly finance future capital costs and that over 80% of Ontarians are served by municipally owned water systems.

Rather than accepting the Walkerton Inquiry results, Bills 195 and 175 sets out a role for the NAFTA-wide private sector in the ownership, operation and financial management of local Ontario water supplies, systems and services. Bill 175 would require municipalities to file a "full cost report" and submit a "cost-recovery plan" outlining how it intends to pay the full costs of water and wastewater services to the public. Importantly, the Minister may require joint reports, providing power to the government to require that a municipality prepare a full cost report with a private sector regulated entity. Moreover, the Minister may impose its own report or delegate that power to the private sector to file and approve the report and plan, despite an alternative local approach, and public expectations otherwise. The Minister may delegate other powers, including the extraction of water supplies, to the private sector.

Such a sweeping delegation to the private sector is contrary to the Walkerton recommendations concerning public accountability. There were no public consultations regarding these Bills that revealed the extent of the provincial government deregulation and privatization agenda. Rather the claim has been that the government is faithfully implementing the Walkerton Inquiry recommendations, which is clearly not the case. Water and especially freshwater is the subject of human rights and a possible public trust. Meeting a basic water requirement for all humans, as well as ecological function takes precedence in government decision-making and allocation priorities.

Key Elements of the Public Trust doctrine:

From the time of the codification of law in the Roman Empire by Emperor Justinian, in the mid-sixth century, certain resources have been treated as so important to civic society that the

exercise of private property rights cannot be allowed to interfere with public access and uses. Over time, it has been learned that there must be very strict limits on the sovereign or these resources might be sold for private gain.

From the historical public trust doctrine, American law has extracted a belief in protecting public expectations through the common law, legislation, and in many state constitutions. A court will look with considerable skepticism upon *any* government act which is calculated *either* to reallocate a natural resource to more restricted uses *or* to subject public uses to the self-interest of private parties. Since the 1971 California Supreme Court decision in *Marks*, courts have agreed that protecting recreational and ecological values is a purpose of the public trust. The 1984 New Jersey Supreme Court in *Matthews* has noted that without some means of access the public right to use resources would be meaningless. Modern American practice shows that no party can acquire a vested right to appropriate water in a way that harms the public's local social and economic expectations and interests.

Canadian courts have recognized more specific public rights to fishing and navigation. The Supreme Court of Canada in *Rhodes* noted that the "Crown, as owner of the foreshore owed a duty to the general public irrespective of the special rights of the riparian owners. It is not assumed that the Crown would be more solicitous for the private interests of certain individuals than for the common law rights of the general public."

Leading legal scholars such as John Swaigen and Catherine Hunt have identified important criteria to determine if the public trust doctrine applies to a particular resources: that the subject of a trust, its limits can become certain, using an objective standard such as the ecological boundaries; that the plaintiffs show a sufficient number of people in the class of beneficiaries, not the entire class; and that statutory dedications to 'future generations' should no longer be considered overly broad or vague.

Guerin marks the Supreme Court's acceptance that the Crown holds reserve land in trust for Aboriginal people much as, in the American public trust doctrine, the state holds its resources in trust for the people. Le Dain J. found: "there is no absolute requirement for the capacity of the Crown to act as trustee to exist, that some statute or agreement explicitly accepts on the part of the Crown that it is a trustee. In other words, the relationship of trustee as between the Crown and the Band could arise by implication from statute or circumstances."

The Ontario *Environmental Bill of Rights* does contain language resembling trust language. It speaks of the right of the people of Ontario to a healthy environment and of their common goal to protect, conserve and restore the natural environment for the benefit of present and future generations. It includes as a purpose, "to protect the right of the present *and future generations* to a healthful environment as provided in this Act" and sets out procedural guarantees to enforce substantive rights. This important statute may have created/ and or codified into law legally enforceable public expectations in favour of a public trust in exhaustible natural resources. These EBR provisions may provide the statutory recognition and procedural guarantees necessary for a court to ensure the substantive rights of a public trust as first recognized in the 1867 Constitution Act.

Section 109 of the Constitution Act states that all lands, mines, minerals and royalties belonging to the provinces of Canada, Nova Scotia and New Brunswick at the time of Confederation belong to the provinces of Ontario, Quebec, Nova Scotia and New Brunswick “subject to any trust existing in respect thereof, and to any interest other than that of the province in the same.” (emphasis added)

Since the establishment of the Canadian Charter of Rights and Freedoms, enshrining the right to security of the person yet failing to entrench private property rights, Canadian courts may be more willing to strike a better balance between public expectations in the commons now and for generations yet to come and, individual economic rights to private property. A modern approach to the public trust doctrine, one that includes concern for future generations and extends to the public interest in water related environmental protection and ecological function appears to have emerged. As private corporations increasingly seek to manage or exploit public resources, the public trust doctrine still has the potential to balance these proprietary interests with public expectations.

Applying the Public Trust Doctrine to Both Bills

There is no doubt that the Canadian public expects that water and access to it remain within the public sector. Because of overwhelming public opposition to losing public control of water, the City of Toronto was unsuccessful in its attempt to create a separate third party Water Board. Residents in Toronto overwhelmingly endorsed public control of the water system as the best guarantee of safety and accountability.

Both Bills define water services as water extraction, treatment and distribution. Because Bill 175 allows the Minister to delegate any of her authority to anyone in her discretion, it could potentially allow the Minister to delegate her authority over water extraction to a private entity, privatizing a traditionally public resource. How far the trust would apply beyond the actual water resource and extend to water-related capital assets and services is an open question. The trust would appear to extend at least to the assets and operations necessary to maintain the public means to the resource, in order to actually access and wisely use it, both now and in the future. Until the public accountability gap and the trade and constitutional concerns are adequately addressed, with due regard to the public and national interests at stake, the current provincial Bills are a significant departure from the recommendations of Justice O'Connor in the Walkerton Inquiry and pose significant risks to environmental protection, ecological function and the public interest now and for the future.

In advance of the Bills becoming law, we call upon the Attorney General of Ontario as the guardian of the public trust and as the advisor to government of all matters of a legislative nature¹, to produce a legal opinion on the constitutional or other authority of the current government to transfer the ownership and operations of local municipal water supplies and systems to the private section, particularly regarding the actual extraction of water, and to identify the trade and investor state dispute consequences under NAFTA and the General Agreement on Trade in Services if Bills 195 and 175 become law.

¹ The Attorney General Act, M. 17, section 5 (f) Functions of the Attorney General.

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1.0 Introduction

This is the second Case Study in a series of three by the Canadian Institute for Environmental Law and Policy (CIELAP) on governance and water resources and quality². It builds upon the first that examined the current NAFTA and the expected GATS obligations likely triggered had the City of Toronto Council voted to change the governance structure of the present Department of Water and Wastewater Services into the Toronto Water Board.³ The focus now is on the constitutional and statutory aspects of two Bills pending before the Ontario legislature -- the Safe Drinking Water Act (Bill 195) and the Sustainable Water and Sewage Act (Bill 175) based upon a comparative review of the public trust doctrine as it may apply to water. The paper also serves as CIELAP's submissions to the legislative committee that is jointly examining the Bills.

CIELAP respectfully requests that the Committee immediately refer the Bills to the Attorney General of Ontario for an opinion on the constitutionality of the transfer of public water resources and assets to the private sector and, on the trade obligations likely triggered by this governance change by the provincial government. Our preliminary findings show that these Bills could not only require municipalities to accept the financial participation of the private sector in local water systems and services but could also permit the Ontario Minister of Environment to transfer the municipal ownership of local water systems to the private sector, despite a possible public trust in those resources and assets, and despite local preferences and public expectations otherwise.

2.0 Bill 195 – The Safe Drinking Water Act

In response to Justice O'Connor's recommendation to establish a Safe Drinking Water Act to gather in one place all legislation and regulations relating to the treatment and distribution of drinking water, the Ontario government introduced Bill 195, the Safe Drinking Water Act, 2002.⁴ CIELAP's welcomes that the proposed Act recognizes that the people of Ontario are entitled to expect their drinking water to be safe.⁵ There are a number of key components of the Bill: the Licensing and Accreditation of Drinking Water Laboratories; Drinking Water, Distribution, Treatment and Monitoring Standards⁶; the appointment of a Chief Inspector; Operating Training and Certification for operators of municipal water systems, including

² See CIELAP's Strategic Plan 2002-2005, Sustainable Policy Solutions Program and Governance for Sustainability Program, see www.cielap.org.

³ See Christine Elwell, Water Grab #1 City of Toronto's Plans for a Water Board Pose Significant Trade Risks, www.cielap.org/whatsnew, November 20, 2002. As describe below this project was overwhelmingly rejected.

⁴ EBR Registry Number:AAA02E0002, posted November 5, 2002.

⁵ Part 1, Purpose, section 1.

⁶ Part 11, Section 10 "Despite any other Act, a requirement that water be "potable" in any Act, regulation, order or other document issued under the authority of any Act or in a municipal by-law shall be deemed to be a requirement to meet, at a minimum, the requirements of the prescribed drinking-water quality standards".

mandatory training and certification of operators of drinking water systems; as well as the Licensing of Drinking Water Systems. Under the proposed legislation, a municipal drinking water license is required for every municipal drinking water systems in Ontario. In order to obtain a license, the municipal owner must have a drinking water works permit, an operational plan, a financial plan and a permit-to-take-water (if required) under the Ontario Water Resources Act.

Importantly too, the Bill imposes a statutory standard of care on those who have oversight of municipal drinking water systems. Some of the duties imposed on owners, operating authorities, operators of drinking water systems and laboratories include a duty to immediately report adverse water test results from municipal and regulated non-municipal drinking water systems to the Ministry and the local medical officer of health and to provide water to users that satisfy the drinking water quality standards.⁷ The proposed legislation correctly outlines that the Minister of the Environment is the Minister responsible for overseeing the regulation of safe drinking water in Ontario and for the administration of the Act. This includes the requirement to table an annual "State of Ontario's Drinking Water Report".⁸

The main focus of this submission, however, is to highlight concerns in the Bill, as well as Bill 175, related to the transfer of ownership of local water systems to the private sector. It is important to note that the drinking water system is defined as “ a physically connected system of works... for the collection, production, treatment, storage, supply or distribution of water...or intake that serves as the source or entry point of raw water supply for the system”.⁹ A "municipal drinking-water system" means a drinking-water system or part of a drinking-water system that is owned by a municipality that is owned by a corporation established under section 203 of the *Municipal Act, 2001*, or from which a municipality obtains or will obtain water under the terms of a contract between the municipality and the owner of the system.¹⁰ An "owner" includes, in respect of a drinking-water system, every person who is a legal or beneficial owner of all or part of the system. Given this broad definition, an owner of a municipal water system can include the private sector.

It is also important to note the broad powers and duties of the Minister of Environment for the administration of the Act, the regulations and generally “for overseeing the regulation of safe drinking water in Ontario”.¹¹ The Minister may enter into agreements with such persons, entities or governments as the Minister considers appropriate for the purposes of this Act. While the Minister has broad powers to delegate duties and appoint Directors in respect of the Act, “No directive shall be issued under this section that relates to the issue, granting, amendment, renewal, suspension or revocation of a particular accreditation, permit, license, approval, certificate or order under this Act”¹². In other words, the Minister must remain directly responsible for the granting of and amendments to municipal drinking water licenses.

⁷ Part 111, Section 11 and 19.

⁸ Part 11, Section 3 (4) This report shall include a review of the quality of raw water supplies and source protection initiatives across the province.

⁹ Part 1, Section 1, Definitions.

¹⁰ Part 1, Section 1, Definitions.

¹¹ Part 11, Section 3 (1).

¹² Part 11, Section 6(2).

An important consideration in the issuance of or amendment to this license is that a financial plan acceptable to the Minister is provided with respect to the municipal drinking water system.¹³ Part V of Bill 195 incorporates by reference the provisions of Bill 175, the Sustainable Water and Sewage Act, 2002.¹⁴ We review the components of this Bill below.

A Director appointed by the Minister **shall** issue a municipal drinking-water license to the owner of a municipal drinking-water system if satisfied, inter alia, that the financial plans for the system, if required, satisfy the requirements under this Act.¹⁵ The Director may impose any conditions necessary in the license and may amend the license at any time for the purposes of the Act.¹⁶ It should be noted that in the license, the Director may relieve compliance with regulatory requirements or require less onerous compliance with the regulatory requirements.¹⁷

The most important feature of Bill 195 for the purposes of this submission relates to the transfer of municipal drinking water systems. Part V, Section 47, states:

“Transfer of municipal drinking-water system

47. If a municipality transfers the ownership of a municipal drinking-water system to a person other than another municipality,

(a) The municipality shall ensure that the agreement transferring the ownership of the system includes all the provisions required to be included by the regulations to ensure continuing municipal responsibility for the system; and

(b) The drinking-water system shall be deemed to continue to be a municipal drinking-water system and shall be subject to all requirements under this Act that relate to municipal drinking-water systems.”

It is unclear what the purpose is or the effect of this “deeming” provision in Bill 195. If we refer to the earlier Proposed Components of a Safe Drinking Water Act discussion paper released by the Ministry in August 2002, it specifies: “In order to ensure that a municipality retains a certain level of responsibility for a system in the event that they decide to transfer ownership to private ownership, the Act would include: An owner of a municipal drinking

¹³ Part V, Applications for new system, Section 32 (5) An application under this section must satisfy the following requirements: 2. In the case of an application for a license, the application must include, ii. proof satisfactory to the Director that the financial plans for the system satisfy the requirements under this Act, if financial plans for the system are required under Bill 175 (Sustainable Water and Sewage Systems Act, 2002, introduced on September 23, 2002) and the Bill receives Royal Assent.

¹⁴ Part V, Section 30 (1) In this Part, “financial plans” means, (a) financial plans that satisfy the requirements of subsection (2), but only if, (i) Bill 175 (Sustainable Water and Sewage Systems Act, 2002, introduced on September 23, 2002) receives Royal Assent, and (ii) sections 3 and 9 of Bill 175 are in force, or (b) financial plans that satisfy the requirements prescribed by the Minister, in any other case.

¹⁵ Part V, Section 40 (1) (d)

¹⁶ Part V, Section 41 (1) (b).

¹⁷ Part V, Section 42 (2).

water system shall ensure it maintains sufficient responsibility for the provision of safe drinking water through appropriate conditions, and /or agreements attached to the transfer of ownership.”

Moreover, an explanatory note to the Bill indicated: “If a municipality transfers the ownership of a drinking-water system to a person other than another municipality, the municipality must ensure that the transfer agreement includes the prescribed requirements. After the transfer, the system is deemed to continue to be a municipal system for the purposes of the Act”.

Presumably the deeming provision in Section 47 is intended to ensure some continuing municipal oversight despite the transfer of ownership to the private sector and that the private sector owner assumes the municipalities’ obligations under the Act and future regulations.

In any event, under Bill 195, a license shall not be transferred unless the Director approves.¹⁸ This decision by the Director is reviewable.¹⁹ Finally, Bill 195 permits regulations to be made “governing agreements for the transfer of ownership of municipal drinking-water systems”.²⁰

To summarize this review of Bill 195, the Act would permit the Ontario Minister of Environment to transfer licenses relating to municipal drinking water systems, including anything used to intake the source or raw water as the supply for the system, to the private sector. As indicated, Bill 195 incorporates by reference Bill 175.

3.0 Bill 175 An Act Respecting the Cost of Water and Waste Water Services

Bill 175, the new Sustainable Water and Sewage Systems Act would make it mandatory for municipalities to assess and cost-recover the full amount of water and sewer services. The proposed Act would require municipalities to file a “full cost report” and submit a “cost-recovery plan” outlining how it intends to pay the full costs of water and wastewater services to the public. Regulations under Bill 195 will specify the drinking water standards to be achieved and Bill 175 will specify the sources of and limits to revenue that are permitted to be included in the plan.²¹ The gap is to be made up somewhere.

The legislation was first introduced by the Ministry of Municipal Affairs and Housing as Bill 155. But fortunately it was reintroduced by Minister of Environment Chris Stockwell to give legal authority to the Ministry of the Environment to manage the legislation. Again the government maintains that the Bill’s commitment to the principles of full-cost accounting and recovery are key aspects of Justice O’Connor’s recommendations.

¹⁸ Discussion Paper, August 2002, p. 26 and see supra fn. 12.

¹⁹ Section 123.

²⁰ Section 163 (3) (9).

²¹ Bill 175, Section 3 (4) The regulations may specify those sources of revenue that a regulated entity is, or is not, permitted to include in the plan and may impose conditions or restrictions with respect to different sources of revenue. This provision in effect imposes a revenue cap.

Walkerton Inquiry Recommends Public System

Indeed, Justice O'Connor made several references to the need for municipalities to ensure that their water systems and assets are adequately financed but all of these recommendations were premised upon continual municipal ownership. Indeed over 80% of Ontarians are served by municipally owned water systems. Justice O'Connor observed:

“Municipal ownership, and the ensuing responsibilities, should provide a high degree of public accountability in relation to the local water system. In the event of mismanagement, municipal residents are in a position to hold those responsible accountable through the electoral process. I see this as a significant advantage to municipal ownership”.²²

He saw no need for the provincial government to prescribe specific changes to the municipal governance structure except in the most extreme circumstance.²³ In fact, most municipalities are well within their borrowing limit to publicly finance future capital costs as set out by the provincial government²⁴

Rather than accepting the Walkerton Inquiry results, Bill 175 sets out a legislative role for the private sector in the ownership, operation and financial management of local water supplies and systems. Instead of a legislative framework based upon municipal ownership, the duties and rights outlined in the bill are directed at all “regulated entities”.²⁵ The drafters are also very clear that the scope of water services covered by it include the extraction of water.²⁶ According to the Bill, the full cost of providing water and waste water services includes the operating costs, financing costs, renewal and replacement costs and improvement costs associated with collecting, treating or discharging waste water and such other costs as may be specified by regulation.

Importantly, the Minister may require joint reports, presumably providing power to the government to require that a municipality prepare a full cost report with a private sector regulated entity.²⁷ Moreover, the Minister may impose its own report, despite an alternative approach taken by the local municipality.²⁸

²² *Walkerton Inquiry Final Report: A Summary and a Response*, Christine Elwell, CIELAP, 2002, www.cielap.org, p. 3 of summary.

²³ *Ibid*, p. 18.

²⁴ *Ibid*. 17.

²⁵ Bill 175, section 3. (1) Every regulated entity that provides water services to the public shall give a written report about those services to the Minister before the date specified by regulation. (2) The report must contain such information as is required by regulation concerning the infrastructure needed to provide the water services, the full cost of providing the services and the revenue obtained to provide them and concerning such other matters as may be specified in the regulation.

²⁶ Bill 175, Section 2(2) The provision of water services to the public includes extracting, treating and distributing water.

²⁷ Joint reports 5. (1) The Minister may direct two or more regulated entities to prepare a joint report under subsection 3 (1) or 4 (1) if the Minister considers it appropriate to do so. (2) The Minister may specify that the

Rather than impose full cost recovery plans from the Minister's office, the more likely approach will be for the Minister to delegate powers to the private sector. The private sector entity would then be in a position to not only require a plan from the municipality that could provide for private ownership and operation of the system but also would be in a position to approve that plan. Section 23 states:

The Minister may, in writing, delegate any of his or her powers or duties under this Act (including the power to give directions and make orders) to any person or entity, subject to such conditions or restrictions, as the Minister considers appropriate.

Such a sweeping delegation to the private sector is also contrary to the Walkerton Inquiry recommendations concerning public accountability above. In summary, by a combination of Bills 195 and 175, the provincial government permits through the delegation of powers to the private sector not only the inclusion of private sector partners in local water systems and services but also the outright transfer of local supplies and services to the private sector, despite local preferences and alternative full cost recovery plans. There were no public consultations regarding these Bills that revealed the extent of the provincial government deregulation and privatization agenda. Rather the spin was that the government was implementing the Walkerton Inquiry recommendations, which is clearly not the case.

3.1 The Human Right to Water

To emphasize the human right of access to safe and affordable drinking water does more than highlight its importance. It grounds the priority on recognized international human rights, it stresses the obligations to ensure public access, and it identifies the obligations of state parties to provide support internationally as well as nationally and locally to give this right practical effect.²⁹ This focus also helps to relieve disputes over the use of shared water by identifying minimum water requirements and priority allocations for all parties. Meeting a basic water requirement for all humans, as well as ecological function should take

joint report is required in lieu of, or in addition to, a report from each of the regulated entities under subsection 3 (1) or 4 (1).

²⁸ Report prepared by Minister 6. (1) The Minister may prepare a report on behalf of a regulated entity if the Minister considers it appropriate to do so. Deemed approval (3) The Minister shall be deemed to have approved the contents of a report prepared by the Minister. Joint plans 11. (1) The Minister may direct two or more regulated entities to prepare a joint plan under section 9 or 10 if the Minister considers it appropriate to do so.

²⁹ Peter Gleick, *The Human Right to Water*, Pacific Institute for Studies in Development, Environment and Security, 1 (5) Water Policy, 487-503, 1999, see <www.pacinst.org>, and the references cited therein, including S. McCaffrey (1992), *Georgetown International Environmental Law Review*, Vol V, 1, 1-24. Although the right to water is considered a derivative right from current international human rights, it has growing recognition for example by direct reference in the UN Convention of the Rights of the Child of 1989, and in the South African Constitution.

precedence in government allocation priorities over other water management, trade and investment decisions.³⁰

The debate over whether access to safe drinking water is a human right or a “need” subject to market forces of supply and demand flared up at The Hague Ministerial on Water Security in the 21st Century. A recent report of the UN Sub commission on the Promotion and Protection of Human Rights agreed that an absence or insufficiency of drinking water threatened the maintenance of international peace and security. Many conflicts are in progress due to the lack of drinking water, and more conflicts will erupt. Interestingly, the report also described the WTO as a “nightmare” for poor countries, as fewer of their inhabitants stood to gain from globalization.³¹

4.0 Water and The Public Trust Doctrine

4.1 Background

In addition to a human rights dialogue, there is also an important legal tradition that has aided civil societies for over a thousand years in promoting practical divisions between public and private property. Modern Courts have found the public trust doctrine to be pivotal in several water development cases. From the time of the codification of law in the Roman Empire (instituted by the Emperor Justinian, mid-sixth century), certain resources have been treated as so important to civic society that the exercise of private property rights cannot be allowed to interfere with public access and uses. These resources belong to the public but are held in trust by the sovereign for specific purposes. Over time, it has been learned that there must be very strict limits on the sovereign or these resources might be sold for private gain. While privatization may capture efficiencies in resource use, it remains to be defined for water markets just what is owned by private actors and what rights are reserved for the public.

Importantly, the doctrine maintains that private rights cannot vest to the detriment of the public trust without clear legislative consideration. When water rights are transferred, there are clear questions about what exactly is being bought and what is being sold. Buyers can’t be buying more than the original seller had claim to in the first place. How to divide economic benefits between temporary private holders of water rights and the public that holds title to a superior interest is difficult. As water has become much more valuable, in theory at least, a great deal of the added value really belongs to the public and is legally recognized as not capable of alienation to private parties without very specific authorization.

³⁰ See Conference, Iguacu Falls, Brazil, on November 24-29, 2000, on elements of UNICEF/WHO Global Assessment 2000 on Water Supply and Sanitation, with a focus on household-centred environmental sanitation, ecological sanitation, waste as a resource, school sanitation, social marketing, risk assessment, serving the urban poor, targets, indicators and monitoring, contact Nabil El-Khodari <khodari@yahoo.com>, and <maharood@who.ch>.

³¹ *Financial Times*, Friday, August 25, 2000, “WTO Protests to UN Over ‘Nightmare’ Report.”

³² But once legislation has clearly altered the public water regime with a private component, the evidence of a remaining public trust suffers, as in the case of New Zealand.³³

4.1.1 The Public Expects Water to Remain Public

Because of overwhelming public opposition to losing public control of water, the City of Toronto was unsuccessful in its attempt to create a separate third party Water Board.³⁴ The public remains committed to a public water system.³⁵ Residents of Toronto overwhelmingly endorsed public control of the water system as the best guarantee of safety and accountability. They strongly opposed the idea of contracting out or private management of the water system and strongly supported the view that private ownership or management of all or part of the water system should be ruled out. In addition, 86% of respondents strongly agreed that, “before any changes are made to the way the water system is run, or who runs it there should be extensive public consultations to let people have their say.” Extensive consultations with the Ontario public specifically about governance changes to local water systems would appear to be necessary. Ontario polling data would also be helpful.

4.1.2 Legal History and Comparative Review

In a time of increasing privatization, the environmental movement has sought new ways to protect public resources. People have used various legal tools, from citizens’ suits to law reform, to protect the environment, yet few in Canada have explored the public trust doctrine. According to the public trust, the Crown holds the resources of the state in trust for its people. Traditionally, the doctrine protected economic values; the Crown protected public rights in water to protect navigation and fishing, as it does in the United Kingdom. More recently, the doctrine has outgrown its historical mould and has become a vehicle for environmental protection. In a modern application of the public trust, the Crown holds public resources in trust for its citizens who benefit not only economically, but also aesthetically and recreationally from them. The trust has also protected the intrinsic value of

³² Consider the case of the Snake River, *Ecology Law Quarterly*, 1997, vol. 24: 461, and more generally, see Michael Warburton at <cwrrp@ecologycenter.org>.

³³ see The Water Pressure Group at <<http://www.water-pressure-group.org.nz>> for details of New Zealand’s program of privatization and the Supreme Court case determining if public trust survives clear legislation.

³⁴ “Water Board idea winds up swirling down the drain; Toronto Star, “Controversial water plan flushed by city”, Globe and Mail, “City sinks water plan”, Toronto Sun, November 20, 2002

³⁵ Toronto Water Watch Polling data taken between May 29th and June 5th, 2002, and published in the Toronto Star, June 15, 2002 found: Three questions tested support for public control of the water system over possible private options. Asked if they were “more in favour of keeping essential services like water under direct public ownership or more in favour of contracting-out essential services like water”, an overwhelming 85% were much more/somewhat more in favour of direct public ownership. A mere 9% favoured contracting out of essential services like water (B7). A near-unanimous 93% (strongly/somewhat) agreed that, “we need to maintain strong public control of drinking water in Toronto, because that is the best guarantee of accountability and safety in the water system.” In contrast, just 6% disagreed with the equation of public ownership with accountability and security in the water system (C1.b). Support for strong public control was consistent and overwhelming across all the regions surveyed. Support was also strong for the statement that, “City Council should make it clear that it will not consider private management or ownership of all or part of Toronto’s water system (C1.g), with 82% (strongly/somewhat) agreeing, compared to 20% who strongly/somewhat disagreed.

these environments, for generations to come. This application has developed in the U.S. – but not as much in Canada. The U.S. has entrenched the doctrine in the common law, legislation, and sometimes in its state constitutions. Canadian courts have so far failed to clearly establish the public trust doctrine in its jurisprudence. Consequently, Canadians have not enjoyed the benefits the doctrine offers for environmental protection, despite public expectations otherwise and the increasing pressure on governments to privatize water resources and related services.

In the U.S., courts have recognized a public trust doctrine, often giving people substantive and procedural rights to enforce their state's obligations as trustees of the environment. In interpreting these guarantees, the courts have balanced private proprietary rights with public expectations; they have not given the public trust an absolutist interpretation. Instead, they have acknowledged the existence of a public trust when public expectations are more certain than opposing private interests. Expectations achieve this certainty when they are clearly defined in law, when there is a history of expectations, and especially when they grow out of both substantive and procedural rights.

American precedent has reinforced these expectations, especially regarding the public management of water. Indeed, water is “at the forefront of the doctrine for public resource management, since water is indeed a diffuse resource with a long history of community management.”³⁶ In the U.S., courts have recognized that the public expects public management of public water, thereby allowing the public trust doctrine to protect this resource.

4.1.3 Historical Development

Roman

The public trust doctrine first appeared in ancient Rome. In 529 A.D. Emperor Justinian ordered his top legal scholars to compile the laws of the Empire. The resulting Institutes of Justinian codified Roman civil law and, in one provision, highlighted the doctrine of public trust.³⁷ This provision stated, “by the law of nature, these things are common to mankind: the air, running water, the sea, and consequently the shores of the sea”³⁸ Designed to ensure public access to the shores and seas, and consequently to the primary destinations of commerce, the doctrine's origins were economic. It protected running water to protect public rights of navigation and fishing. Even so, the public trust guarded the public's access to these resources: the sea was not owned, but rather subject to the guardianship of the Roman people; the rivers could be owned, but remained subject to public rights of navigation and fishing.³⁹ Over time, the trust would guard not only the economic, but also the social value of the land and water.

³⁶ C. Rose, ‘Joseph Sax and the Idea of the Public Trust’ (1998) 25 Ecology L. Quarterly 351 at 354.

³⁷ ‘Public Trust: A Gift From a Roman Emperor’, Online:

<http://www.epa.gov/owow/estuaries/coastlines/fall97/publictr.html> (retrieved 6 August, 2002).

³⁸ Institutes of Justinian, 2.1.1 (529 A.D.) as cited in ‘Public Trust Doctrine’, Online :

<http://cyber.law.harvard.edu/eldredvreno/pubtst1.html> (retrieved 31 July, 2002).

³⁹ C. Hunt, ‘The Public Trust Doctrine in Canada’ in *Environmental Rights in Canada*, J. Swaigen, ed. (Toronto: Butterworths, 1981) at 152 [hereinafter Hunt].

British

The purpose of the public trust would not shift immediately. Soon after the decline of the Roman Empire, England organized its land under a system of private property rights until, as in Roman times, commerce demanded public rights in waterways. The 1215 Magna Carta introduced public rights to English law. Different sections mandated removing weirs throughout England – which gave the public a right to fish – and ensuring public rights to move over land and water.⁴⁰ Then during the 1600s, as the crown asserted its ownership of the shores, Lord Hale stated this ownership and the title of any private grantees was subject to public rights of navigation and fishing.⁴¹

The Justinian doctrine of public trust had become a part of the English common law. In the 1821 case of *Arnold v. Mundy*, the court wrote, “so neither can the king intrude upon the common property, thus understood, and appropriate it to himself or the fiscal purposes of the nation. The enjoyment of it is a natural right which cannot be infringed or taken away, unless by an arbitrary power, and that, in theory at least, [can]not exist in free government.”⁴² By this time, public rights of fishing and navigation overrode private or crown ownership of the foreshore or streambeds. Indeed, by 1865, the courts had clearly articulated the public’s right of access to navigable waters and the Crown’s duty to protect this right.⁴³ This principle did not expand further, however, as these public rights protected primarily commercial activities and did not include a right to recreation or environmental protection. Such rights would develop in the American context.

American Development

In the last century, American courts have adopted the Roman and English public trust doctrine. Since the original thirteen states adopted the English common law, the public trust has been part of American jurisprudence, varying only slightly between states.⁴⁴ States have also passed legislation and amended their constitutions to give more authority to the public trust. Yet, in its American application, the public trust doctrine has broken its historical mould and become an instrument of environmental protection. American courts have not limited the doctrine to its historical scope; rather, they have taken from the Roman and English tradition a commitment to upholding reasonable expectations. In his article “Liberating the Public Trust Doctrine from Its Historical Shackles”, the doctrine’s foremost proponent, American professor Joseph L. Sax, writes the following:

I do not mean to suggest the medieval doctrine of custom should be revived in the late 20th century under the name of the public trust. I do believe, however, that the public trust doctrine should be employed to help us reach the real issues – expectations and destabilization – whether the expectations are those of private property ownership, of a diffuse public benefit from the ecosystem protection or of

⁴⁰ *Id.* at 153.

⁴¹ *Id.* at 153.

⁴² *Arnold v. Mundy*, 6 N.J.L. 1, 87-88 (1821).

⁴³ *Gann v. Free Fishers of Whitstable* (1865), 11 H.L. Cas. 192).

⁴⁴ J. Archer and T. Stone, ‘The Interaction of the Public Trust and the ‘Takings’ Doctrines : Protecting Wetlands and Critical Coastal Areas’ 20 Vt. L. R. 81 at 84 [hereinafter Archer and Stone].

a community's water supply. The historical lesson of customary law is that the *fact* of expectations rather than some formality is central. Of course, title is not irrelevant where ownership is actually a surrogate for reliance and expectation and where non-recognition of title would in fact be destabilizing. Conversely, where title and expectations are not congruent, title should carry less weight.⁴⁵

From the historical public trust doctrine, American law has extracted a belief in protecting expectations. It protects these expectations, as mentioned, through the common law, legislation, and sometimes in state constitutions.

Common law consideration

The first major case to highlight the public trust doctrine in the U.S. was *Illinois Central Railway v. Illinois*.⁴⁶ Here, the Illinois legislature had granted in fee simple submerged lands, comprising nearly the entire commercial waterfront in Chicago, to the railway company. After a few years, the legislature went to the courts with an action to declare the grant invalid. The United States Supreme Court agreed. Although it did not prohibit granting public property to corporations or individuals, the court viewed the submerged lands differently, stating they should be held in trust for the state's constituents to fish, navigate, and engage in commerce. This view became central in subsequent litigation.

Summarizing this case, Sax writes: when a state holds a resource which is available for the free use of the general public, a court will look with considerable skepticism upon any government act which is calculated either to reallocate that resource to more restricted uses or to subject public uses to the self-interest of private parties.⁴⁷ (emphasis added) Over time the courts would start to criticize government acts that restricted not only commercial, but also recreational and environmental uses of public land.

The latest major American case to test the public trust doctrine was *National Audobon Society v. Superior Court*.⁴⁸ This case concerned Mono Lake, California's second largest, a unique ecological formation and a habitat for brine shrimp and many nesting and migratory birds. In 1940 the Division of Water Resources gave a permit to Los Angeles' Department of Water and Power (DWP) to appropriate the water from four of the five streams flowing into the lake. These streams brought Mono Lake snowmelt from the Sierra Nevada; without them, the Lake's only water sources were rain and snow on the ice. The DWP soon diverted about half the flow of these streams, causing Mono Lake's water level to drop and harming its environment, especially its bird population.

The court had to balance two legal doctrines: that of appropriative water rights and that of the public trust – the same conflict Sax identified between title and expectations. It did so by

⁴⁵ J. Sax, 'Liberating the Public Trust Doctrine from Its Historical Shackles' (Winter 1980) 14 *U.C. Davis L. Rev.* 184 at pp. 192-3.

⁴⁶ *Illinois Central Railway v. Illinois*, 146 U.S. 387 (1892).

⁴⁷ J. Sax, 'The Public Trust Doctrine in Natural Resource Law : Effective Judicial Intervention' (1970), 68 *Mich. L. Rev.* at pp. 490.

⁴⁸ (1983), 33 Cal. 3d 419 [hereinafter *National Audobon*].

assessing changing public values. Citing its decision in *Marks v. Whitney*⁴⁹, the Supreme Court held that “the traditional triad of uses – navigation, commerce and fishing – did not limit the public interest in the trust res.”⁵⁰ It acknowledged that public values change and that now one of the most important uses of tidelands “is the preservation of those lands in their natural state, so that they may serve as ecological units for scientific study, as open space, and as environments which provide food and habitat for birds and marine life, and which favorably affect the scenery and climate of the area.” The plaintiffs here sought to protect such recreational and ecological values; and since *Marks*, courts have agreed that protecting these values is a purpose of the public trust.

Having considered the values the public trust protects, the court then addressed how the doctrine protected them. Reviewing the case law, the court decided that the doctrine allowed the state, as the trustee, to revoke previously granted rights (as in *Central Illinois*) and to enforce the trust against lands previously thought unburdened by the trust.⁵¹ The Attorney General of California argued for a broad concept of trust uses; it maintained the trust over water would protect all public uses of water, from recreation to water supply for a distant county. The court rejected this argument, noting that the public trust only protects uses and activities in the vicinity of the water. This interpretation matches the doctrine’s historical development. It has always protected local uses of water – commercial, recreational, or otherwise. The doctrine, stated the California Supreme Court, “is more than an affirmation of state power to use public property for public purposes. It is an affirmation of the duty of the state to protect the people’s common heritage of streams, lakes, marshlands and tidelands, surrendering that right of protection only in rare cases when the abandonment of that right is consistent with the purposes of the trust.”⁵² The court allowed the plaintiffs to challenge the DWP’s decision using the public trust doctrine, even before it had pursued an administrative remedy, and the doctrine thus became entrenched in American common law.

This decision did not prohibit all appropriative uses of water. Instead, it decided the “public trust doctrine and the appropriative water rights system are parts of an integrated system of water law.”⁵³ States would hold flowing waters, tidelands, and lakeshores in trust for the public. No party could acquire a vested right to appropriate this water in a way that harmed the public’s local social and economic interests. Yet the state could still issue licenses, permitting appropriators to take water from one part of the state and move it to another. In doing so, however, the state must acknowledge the public trust doctrine and infuse it into its decision-making. While a tributary may be rerouted to supply water to Los Angeles, it must be done in a way that, so far as possible, maintains that tributary for the use of the public, thereby balancing rights and expectations.

From *Illinois* to *Mono*, the courts have created a body of case law accepting the public trust. The doctrine has extended and now protects nearly all public land and parks. The Supreme

⁴⁹ *Marks v. Whitney* (1971), 6 Cal. 3d 251. Here, the California Supreme Court held that the public trust protected uses such as the right to fish, hunt, bathe, swim, boat, and to participate in other recreational activities.

⁵⁰ *National Audobon*, *supra* note 13 at 434.

⁵¹ *Id.* at 440. See also *City of Berkeley v. Superior Court*, 26 Cal. 3d. 515.

⁵² *Id.* at 441.

⁵³ *Id.* at 452.

Court of Massachusetts used the doctrine to disallow plans for a ski resort in a state park.⁵⁴ It also granted the public access to private land, where it was necessary to reach a land held in public trust.⁵⁵ The New Jersey Supreme Court has held the same, noting that “without some means of access the public right to use the foreshore would be meaningless.”⁵⁶ (emphasis added) Courts have also expanded the doctrine to protect many American waters. Its geographic scope covers all waters subject to the ebb and flow of the tide, navigable or not, and all navigable waters, including lakes ponds, rivers and streams.⁵⁷ Given the U.S.’s broad definition of navigable waters, the doctrine has attained significant scope.

The doctrine also protects many uses of these environments. In *Marks*, the California Supreme Court used the public trust to not only protect economic uses, but also private hunting, bathing, boating and other recreational activities.⁵⁸ In New Jersey, the doctrine protects bathing, swimming, and other recreational shore activities.⁵⁹ Elsewhere, courts have included as recreational uses activities like water skiing⁶⁰, sailing, rowing, and skating.⁶¹ More importantly to environmentalists, the doctrine has protected undeveloped land, not for any human purpose, but rather because of its intrinsic ecological value.⁶² The doctrine has become a significant part of American jurisprudence, aptly defined in *Mono Lake*.

Statutory consideration

Some state legislation includes the public trust doctrine, either specifically, often creating a public trust cause of action, or generally, in the language of statutes dealing with natural resources. For example, the Michigan Environmental Protection Act (MEPA) grants a specific right to a public trust. Drafted by Joseph Sax, MEPA has been a leading example of an explicit statutory trust since its passage in 1970. It grants citizens a right to initiate proceedings based on a violation of the public trust; it allows them to assert environmental damage as if they were asserting damage to private property or breach of contract; and it subjects administrative decisions that might infringe upon the protection of a public trust in natural resources to judicial review.⁶³ In Wisconsin, another statute allows courts to review the actions of legislature or the Department of Natural Resources; if the action breaches the public trust, the court can ask the impugned party to show it has acted in the public interest.⁶⁴ Generally, for the public to receive such clear rights, the statute must be specific in its recognition of the trust and in its procedures to enforce the public trust.

Constitutional consideration

⁵⁴ *Gould v. Greylock*, 215 N.E. 2d 114 (1996).

⁵⁵ *Opinions of the Justices*, 313 N.E.2d 561, 566-67 (Mass. 1974).

⁵⁶ *Matthews v. Bay Head Improvement Association*, 471 A.2d 355 (N.J. 1984) at 364.

⁵⁷ Archer and Stone, *supra* note 44 at 85. See also *Phillips Petroleum*, 484 U.S. at 476.

⁵⁸ *Marks*, *supra* note 49 at 380.

⁵⁹ *Neptune City*, 294 A.2d at 54-55.

⁶⁰ *Lake Delton*, 286 N.W.2d at 633.

⁶¹ *Lamprey v. Metcalf*, 53 N.W. 1139 (Minn. 1893) at 1143.

⁶² Archer and Stone, *supra* note 44 at 91.

⁶³ Hunt, *supra* note 39 at 159.

⁶⁴ M. K. Scanlan, ‘The Evolution of the Public Trust Doctrine and the Degradation of Trust Resources: Courts, Trustees and Political Power in Wisconsin’ 27 Ecology L. Quarterly 135 at 147.

Some states have given the public trust doctrine more supremacy by placing it in their constitutions. The Pennsylvania constitution, for example, states, “Pennsylvania’s public natural resources are common property of all the people, including generations yet to come. As trustee of these resources, the Commonwealth shall conserve and maintain them for the benefit of all the people.”⁶⁵ North Carolina constitutionalizes a state policy to “protect its lands and waters for the benefit of all citizenry”⁶⁶ Wisconsin has also entrenched the public trust doctrine in its constitution.⁶⁷ Nearly half of American states currently have such a constitutional provision.

According to Wisconsin’s constitution, the legislature can only grant to counties those powers that affect people of a locality, not all the people of a state. Courts have ruled that the public trust is a statewide, not a local, concern and therefore cannot be so delegated.⁶⁸ Yet this prohibition is not absolute. In a subsequent case, the Wisconsin Supreme Court has listed situations where the administration of a public trust can be delegated: first, if the state continues to supervise the delegates; second, if the delegation’s purpose is to advance the public interest; and, third, where the state establishes limits and standards for the delegate to follow.⁶⁹ Wisconsin’s trust is not absolute – the state can delegate away its administration.

Similarly, in Pennsylvania, cases have acknowledged the constitutional trust, but have not overturned legislation that infringes upon this right. As professor Constance Hunt comments, American courts reluctantly contradict legislation and will only do so if the plaintiffs can disprove the presumption of constitutionality that legislation enjoys. Courts impose a duty on government and its agencies to consider the public trust in its decision-making, but rarely overturn these decisions for failing to do so.⁷⁰ These constitutional provisions, while powerful on their face, contain much loose language, permitting the courts to dodge a conflict with legislative intent and interpretation. For the courts to accept a constitutional trust, the constitutional provision must be extremely clear, for such a decision gives the doctrine much more permanency than a simple common law judgment.

Indeed, as in their interpretations of statutory and common law trusts, the American courts have not interpreted the constitutional public trust doctrine to be an absolute protection of the historical public uses of water, but rather a framework of values which the state must uphold when making decisions about its natural resources. Sax summarizes the American common law trust, acknowledging courts’ tendencies to restrict governments that restrict the use of public lands or transfer them to private parties.⁷¹ The nature of the trust – whether common law, statutory, or constitutional – shows the courts the weight the public trust will have when competing with a conflicting interest. The more supreme the public trust’s legal basis and the more clear its guarantee, both substantially and procedurally, the more the public will

⁶⁵ P.A. Const. Art. I, 27.

⁶⁶ N.C. Const. Art. CIV, 5.

⁶⁷ W.I. Const. Art IV, 22.

⁶⁸ *Muench v. Public Sev. Comm’n*, 55 N. W. 2d 40 at 53 (Wisc. 1952).

⁶⁹ *Menzer v. Village of Elkhart Lake*, 186 N.W. 2d 290, 294-97 (Wisc. 1971).

⁷⁰ Hunt, *supra* note 39 at 163.

⁷¹ J. Sax, ‘The Public Trust Doctrine in Natural Resources Law’ (1970), 68 *Michigan Law Review* 471, at 484.

expect the courts to uphold the doctrine. Only then, when, according to the rule of law, the government rules with clarity and certainty, will expectations outweigh property interests.

4.1.4 Canadian Development

Common law consideration

The public trust doctrine has not so far developed as extensively in Canada, neither in the common law nor in statutory and constitutional law. Where the U.S. has adopted and expanded the English public trust, Canada has neglected this part of its legislative heritage and so far Canadian courts have not acknowledged a common law public trust action. Although the courts often reference the public interest, they do so in the context of public nuisance actions or the right of navigation and fishing. These public rights, for reasons discussed below, provide only a weak basis for the public trust doctrine in Canada.

While courts have not recognized a public trust doctrine at common law, they have recognized other public rights. Public nuisance actions target unreasonable interferences with a public interest, such as the right to enjoy a public beach or a certain noise level. Although public trusts and public nuisance actions could potentially preserve the same public rights, the two actions have differences. Public trust actions would be brought against the government, as a trustee; public nuisance actions are brought against anyone who unreasonably interferes with a public right. Public trust actions would require a breach of a positive obligation; public nuisance actions require no such obligation. Critics have argued that public nuisance claims cannot replace the potential of the public trust doctrine; the former is constrained by more restrictive requirements and can usually only be brought by the Attorney General.⁷² Thus, the public trust doctrine is narrower than public nuisance.

Still, the two share many of the same impediments. Standing, for example, is a large hurdle for both. The B.C. Supreme Court noted in *Re Greenpeace* “private individuals have no inherent right to seek injunctive relief to protect the public at large from a wrongful invasion of its rights. It is for the Attorney-General to discharge that function.”⁷³ This statement applies to public nuisance actions and, foreseeable to public trust actions as well. Private citizens can only bring a private action in public nuisance when they can show special damage, special in kind and not merely degree.⁷⁴ Otherwise, the Attorney General, as the protector of the public interest, must bring whatever actions his or her discretion allows. Furthermore, any public trust action would likely face the same balancing act that weakens public nuisance actions: that between social utility and public interest, another way of characterizing Sax’s dichotomy between property rights and expectations. Courts have given fewer damages, or none at all, when the social utility of the interference has outweighed the public interest.⁷⁵ Public trust actions would likely face a similar struggle, trying to preserve

⁷² R. Lazarus, ‘Changing Conceptions of Property and Sovereignty in Natural Resources: Questioning the Public Trust Doctrine’ (March 1986) 71 I.A.L.R. 631 at 660. Private actions in public nuisance can also be brought by individuals but, practically, the requirement of showing ‘special injury’, different in kind and not merely in degree from the public, precludes most such actions.

⁷³ *Re Greenpeace Foundation of British Columbia et al. And Minister of the Environment*, 122 D.L.R. (3d) 179 at 184.

⁷⁴ *Hickey* (Nfld public nuisance case).

⁷⁵ *Boomer Cement* (a social utility/public nuisance case)

public rights in property when the use of that land or water might have another social value – take Mono Lake, for example. General public rights in Canadian common law are not often litigated because of these impediments.

Canadian courts have recognized more specific public rights to fishing and navigation. These rights, while narrow, certainly exist in Canadian jurisprudence.⁷⁶ They do not include the right to access a shore from private land or to access private land from navigable waters. They do, however, let the public travel through and fish in “public highways” – navigable water that is not otherwise regulated.⁷⁷ A Supreme Court of Canada case noted that the “Crown, as owner of the foreshore, had undoubtedly the right to cut it up and dispose of it as it deemed best; but clearly in doing so it owed a duty to the general public irrespective of the special rights of the riparian owners ... It is not assumed that the Crown would be more solicitous for the private interests of certain individuals than for the common law rights of the general public”⁷⁸ Because of the courts’ continued recognition of these public rights, the public has come to expect and even rely on their guarantee. To guarantee only these rights under a public trust, however, would be a narrow and dated interpretation of the doctrine. Indeed, while Canadian courts have accepted public rights to access navigable water for fishing and navigation, they have not followed the UK in expanding these rights and protecting them as public trust rights.⁷⁹ Moreover, enforcement of these rights might encounter the same obstacles as public nuisance actions.

Even if one existed, a public trust action would not impede legislation that violated the trust. The federal government could, for example, regulate the public right to fish according to the *Fisheries Act*⁸⁰ or the right to navigate waters according to other federal law.⁸¹ A common law action directed against governments that could immunize themselves by passing legislation is not a valuable environmental tool. Thus, while public rights exist in Canada, their scope is narrow. Canadian courts have so far not adequately ensured a broader guarantee, like the American public trust system.

Statutory consideration

A statutory right to a public trust has rarely been raised in Canadian jurisprudence. The court rejected it in *Green v. The Queen*.⁸² In this case, the plaintiffs alleged section 2 of Ontario’s *Provincial Parks Act* imposed a statutory trust on the Province, that in 1968 had leased some of the sandbanks on the shore of Lake Ontario to a concrete company that sought to excavate the sand. The Province later established a provincial park on adjacent land. Section 2 of the *Act* stated, “All provincial parks are dedicated to the people of the Province of Ontario and others who may use them for their healthful enjoyment and education, and the provincial parks shall be maintained for the benefit of future generations in accordance with this Act

⁷⁶ Hunt, *supra* note 39 at 167.

⁷⁷ *Id.* at 164-165.

⁷⁸ *Rhodes v. Peruuse* (1909), 41 S.C.R. 254 at 268.

⁷⁹ *Id.* at 264.

⁸⁰ R.S.C. 1985, c. F-14.

⁸¹ M. Valiante, ‘An Overview of Canadian Law and Policy Governing Great Lakes Water Quantity Management’ (December 1985) 18 J. Int. L. 1 at 117.

⁸² *Green v. The Queen in right of the Province of Ontario et al.*, [1973] 2 O.R. 396 (O. H.C.J.) [hereinafter *Green*].

and the regulations.” The plaintiffs argued that this provision established the Province as a trustee of the provincial parks and, by permitting excavation around Sandbanks, it had breached its trusteeship.

The court rejected this argument, stating the plaintiffs did not have standing.⁸³ Lerner J added that even if standing was granted, no public trust existed. He gave 3 main reasons: First, the court argued that section 2 of the *Act* was uncertain about the subject matter of the trust; the Province could close the park or change its size. Second, section 3(2) of the same *Act* gave the Province broad discretion in dealing with the park, something incompatible with trust doctrine. Finally, the court decided the beneficiaries of the trust were too ambiguous. Looking at the decision through Sax’s expectations analysis, we see the court found the *Act* too vague to create any expectations of a trust that would trump property rights. Consequentially, the court stifled not only the plaintiff’s case, but also a basis for a statutory public trust in Canada.

In the years following *Green*, few cases have brought actions based on a breach of a public trust; however, the decision in *Green* does not preclude such actions. Indeed, judicial opinions on environmental issues have changed since 1973.⁸⁴ Reviewed today, many parts of the case seem wrongly decided, even though its result would probably stand appeal. Moreover, *Green* does not prevent other statutes, containing clearer language, to create public expectations and to form the basis for a public trust action.

The reasons given by Lerner J. can and have been criticized. That the trust had no certain subject matter is debatable. Professor Hunt has argued, citing trust law scholar D.W.M. Waters, that the subject of a trust will be certain if the courts can determine, using an objective standard, the quantum of the trust – its limits, in other words.⁸⁵ The limits of provincial parks are more easily defined than Lerner J. suspected. Not precisely limited by its boundaries, a provincial park – or at least the ecosystem it contains – might extend to surrounding property, as determined by scientific study. Lerner J. doubted this science writing, “that ‘the towering sand dunes ... constitute ... a unique ecological, geological and recreational resource ...’ is clearly a statement of opinion as much as a comment that a particular object d’art is good or bad esthetically.” Science has clearly shown otherwise; it can prove the importance of a dune in an ecosystem. Thus, the limits of a trust can be defined by scientific analysis and are not ambiguous matters of opinion.

Moreover, contrary to Lerner J.’s decision, the beneficiaries of the trust are not uncertain. At one point, he comments on the words in the plaintiff’s style of cause that includes all people in Ontario and their future generations. According to Lerner J., present and future Ontarians “add nothing to the issues, nor do they improve the plaintiff’s legal position. They are pretentious and again frivolous, and a paradox.”⁸⁶ Although he is dealing here with the standing issue, this quotation shows the court’s belief that such a wide class of people must

⁸³ *Id.*

⁸⁴ J. Benidickson, *Environmental Law* (Concord, Ontario: Irwin Law, 1997) at 214.

⁸⁵ Hunt, *supra* note 39 at 175.

⁸⁶ *Green*, *supra* note 82.

be overly vague. However, since the 1970 case *McPhail v. Doulton*⁸⁷, the House of Lords has only required the plaintiffs to show a sufficient number of people in the class of beneficiaries, not the entire class. Those named provide enough certainty for the trust and occupy its benefits until future beneficiaries are born. Thus, statutory dedications to ‘future generations’ should not be considered overly broad or vague.

However, that section 3(2) of the *Act* was incompatible with trust doctrine is true. Hunt again cites Waters, arguing that Canadian courts have wrongly stated that trusts cannot be revocable. The Alberta case of *Sorenson v. Sorenson*⁸⁸ states trustees, in some cases, can revoke the trust in whole or in part. Applying this argument to the situation in *Green*, the Crown could revoke the trust it held in the sandbanks, yet before it did, a trust would exist therein. The nature of this trust, like those in the American cases, would not be absolute. The absolutist trust doctrine stems from classical trust law, not the historical public trust doctrine. Because the statute grants government broad discretion in administering the park, legitimate use of this discretion cannot be overridden by the general language in section 2.⁸⁹ This statutory discretion is why the plaintiffs and ultimately the public trust doctrine failed in *Green*. The *Provincial Parks Act* vests its management in the government, not the people. Another Act might impose a greater duty and grant less discretion, yet the *PPA* does not and for this reason failed as a statutory trust.

Even so, nothing in Lerner J.’s decision precludes other legislation from establishing a public trust doctrine. A statute, with clear language, might encourage the courts to acknowledge a trust, yet even broad language might suffice: as Le Dain J. wrote in *Guerin* as cited by the Ontario High Court, “there is no absolute requirement for the capacity of the Crown to act as trustee to exist, that some statute or agreement explicitly accepts on the part of the Crown that it is a trustee. In other words, the relationship of trustee as between the Crown and the Band could arise by implication from statute or circumstances.”⁹⁰ Only one Canadian statute contains explicit public trust language, though some may imply a more general public trust.

Yukon’s *Environment Act* deems its territorial government “the trustee of the public trust.” This statute requires the government to “conserve the environment in accordance with the public trust”, defining trust as “the collective interest of the people of the Yukon in the quality of the natural environment and the protection of the natural environment for the benefit of the present and future generations.”⁹¹ In Alberta, the *Willmore Wilderness Park Act*⁹² and the *Provincial Parks Act 1974*⁹³ contain clauses that seem to dedicate natural resources to the public. They would face the same challenges – of clarity, certainty, and procedural guarantee – that faced the *Provincial Parks Act* in Ontario, in the *Green* case. Ontario has some legislation that seems to place the Province in the role of trustee over

⁸⁷ (1971), A.C. 424, [1970] 2 All E.R. 228 (H.L.).

⁸⁸ [1977] 2 W.W.R. 438 (Alta. C.A.).

⁸⁹ John Swaigen comments in email.

⁹⁰ Le Dain J. in *Guerin et al. v. The Queen* (1982), 143 D.L.R. (3d) 416 and cited in *Gardner et al. v. The Queen* (1984), 45 O.R. (2d) 760.

⁹¹ *Environment Act*, S.Y. 1991, c. 5, ss. 2 & 38.

⁹² R.S.A. 1980, c. W-10, s. 4.

⁹³ R.S.A. 1980, c. P-22.

natural resources. Section 1 of the *Beds of Navigable Waters Act*⁹⁴ states that where land surrounding or under navigable water is granted by the Crown, this grant will not include the navigable water too, unless it explicitly says so. The Crown retains the navigable water in trust – or least under its administration – for the benefit of the public. However, the Environmental Bill of Rights holds the best promise of a statutory recognition of the public trust doctrine in Ontario.

The Ontario Environmental Bill of Rights

The *Environmental Bill of Rights*⁹⁵ (EBR) does contain language resembling trust language in its prologue. It speaks of the right of the people of Ontario to a healthy environment and of their common goal to protect, conserve and restore the natural environment for the benefit of present and future generations.⁹⁶ Yet, it also states that the Province has the primary responsibility for achieving this goal. The EBR also includes as a purpose, “to protect the right of the present *and future generations* to a healthful environment as provided in this Act.”⁹⁷ Together, these sections suggest “there is a right and then provides the means to enforce that right.”⁹⁸

Yet the right’s scope and enforceability remain undeveloped issues for courts. They might interpret the Preamble and Purpose section to give Ontario citizens, present and future, a right to enjoy the natural environment, a right protected by the government. If courts did construe this language to create a trusteeship, however, the language could only help as an interpretive guide for the rest of the *Act*, and not as a substantive right in itself, since it is located in the Preamble.⁹⁹ Nevertheless these EBR provisions may provide the statutory recognition and procedural guarantees necessary for a court to ensure the substantive rights of a public trust as acknowledged in the 1867 Constitution Act, discussed below.

The EBR contains another section that protects public resources: it grants a right of civil action to protect public resources. Section 84(1) states the following: Where a person has contravened or will imminently contravene an Act, regulation or instrument prescribed for the purposes of Part V and the actual or imminent contravention has caused or will imminently cause significant harm to a public resource of Ontario, any person resident in Ontario may bring an action against the person in the court in respect of the harm and is entitled to judgment if successful.¹⁰⁰

Part V lists most of Ontario’s environmental legislation. The plaintiff must prove a violation of any one these listed statutes and show that this violation caused or will imminently cause

⁹⁴ R.S.O. 1990, c. B-4.

⁹⁵ S.O. 1993, c. 28.

⁹⁶ *Id.* Preamble.

⁹⁷ *Id.*, s. 2(1)(c). *Italics* added.

⁹⁸ Paul Muldoon and Richard Lindgren, *The Environmental Bill of Rights: A Practical Guide* (Toronto: Emond Montgomery Publications, 1995) at 46.

⁹⁹ The *Interpretation Act*, R.S.O. 1990, c. I.11 states the ‘preamble of an Act shall be deemed a part thereof and is intended to assist in explaining the purport and the object of the Act’. It does not, in itself, create substantive or procedural rights.

¹⁰⁰ *Environmental Bill of Rights, 1993*, S.O. 1993, c. 28, s. 84(1).

“any contamination or degradation”¹⁰¹ to air, public land or water, associated ecosystems and plant and animal life.¹⁰² Section 84(1) essentially establishes a procedural right to protect public resources. Reading the Act as a whole, this section strengthens not only the *EBR*’s substantive guarantees, but also those in most all of Ontario’s environmental legislation dedicated to protecting public resources, including perhaps, the 1867 Constitution. What it protects, however, is not likely a public trust per se between Ontario and its citizens, but rather only those resources that the government chooses to protect through legislation. The question is whether the courts would read in a constitutionally recognized public trust. Even so, section 84(1) is a model procedural guarantee that a substantive trust would need. It outlines a clear process for challenging violations of public rights in court.

Federally, the *Canada National Parks Act (CNPA)* hints at a public trust. The Act’s main purpose section states that the “national parks of Canada are hereby dedicated to the people of Canada for their benefit, education and enjoyment, subject to this Act and the regulations, and the parks shall be maintained and made use of so as to leave them unimpaired for the enjoyment of future generations.”¹⁰³ This language dedicates national parks to, and perhaps even places them in trust for, future generations. John Swaigen writes, “this wording not only reflects an intention to preserve the national park lands in perpetuity for the benefit of the public but also, in combination with the many restrictions in the Act and regulations on the government’s discretion to dispose of land, deregister parks, and permit harmful activities, may even establish an intergenerational trust so that future Canadians are left with unimpaired parks from generation to generation.”¹⁰⁴ Unlike the dedication in Ontario’s *Provincial Parks Act*, that in the *CNPA* is not subject to the Act and its regulations. The court in *Green* upheld government discretion largely because the dedication clause states, as Swaigen puts it, “the parks must be maintained to the extent that the legislation requires the parks must be maintained.”¹⁰⁵ Section 4(1) subjects the benefit, education, and enjoyment of the Canadian people to the Act and Regulations, but not the dedication itself. Had the court looked at this language in *Green*, its decision might have been quite different.

The Federal Court, Trial Division considered this issue in *Canadian Parks & Wilderness Society v. Superintendent of Wood Buffalo National Park*.¹⁰⁶ The plaintiff claimed s. 4(1) of the *CNPA* created a trust. The court did not rule on the issue, however; the federal government instead accepted an order disallowing logging in the park. The status of section 4 has yet to receive judicial comment.

¹⁰¹ *Id.*, s. 1. This section contains the *EBR*’s definitions, including that of ‘harm’, referred to here.

¹⁰² *Id.*, s. 1. Specifically, the *EBR* defines public resources as ‘air; water, not including water in a body the bed of which is privately owned and on which there is no public right of navigation; unimproved public land; any parcel of public land that is larger than five hectares and is used for recreation, conservation, resource extraction, resource management, or a purpose similar to one mentioned [these] subclauses ... and any plant life animal life or ecological system associated with any air, water or land described [above].’

¹⁰³ *Canada National Parks Act*, S.C. 2000, c. 32. This Act replaced the *National Parks Act*, R.S.C. 1985, c. N-14, as amended.

¹⁰⁴ John Swaigen, ‘Parks Legislation in Canada: A Comparison of the New *Canada National Parks Act* and Ontario’s Existing *Provincial Parks Act*’ (2001) 10 J.E.L.P. 223 at 227.

¹⁰⁵ *Id.* at 227.

¹⁰⁶ (1992), CarswellNat 763 (Fed. T.D.) [hereinafter *Wood Buffalo*].

So, of those Canadian statutes that may contain substantive rights to a public trust, the *EBR* is the only one that gives the procedural rights needed to enforce a trust. Recall that the effectiveness of Michigan's EPA depended largely on this procedural guarantee; without it, the public has no certain avenue to challenge violations of substantive rights. The absence of a procedural right may be the reason why the public trust guarantee in Yukon's *Environment Act* remains unlitigated. To follow the path of the litigants in *Green*, asking a provincial court for a judicial review of a legislative decision might be the procedural avenue to enforce clear statutory rights. Statutory guarantees do create expectations; the question is whether courts will find that the aforementioned Canadian statutes are sufficiently clear, in their substantive and procedural guarantees, to create and or to have codified into law legally enforceable public expectations. A statutory trust has potential in Canada but, like a new common law public trust action, its acceptance will require a focused undertaking to challenge judicial thinking. Given increasing pressure to privatize public services, no doubt courts will be called upon to test the legislative authority of governments that purport to extinguish public ownership of common resources.

Constitutional consideration

As in the American context, Canada might also have a constitutional basis for the public trust doctrine. Unlike many American state constitutions, the Constitution Act 1867 does not include specific public trust rights. Yet, some argue section 109 contains a broader guarantee.¹⁰⁷ Section 109 states that all lands, mines, minerals and royalties belonging to the provinces of Canada, Nova Scotia and New Brunswick at the time of Confederation belong to the provinces of Ontario, Quebec, Nova Scotia and New Brunswick "subject to any trust existing in respect thereof, and to any interest other than that of the province in the same."¹⁰⁸ (emphasis added) At first, this clause would seem to entrench constitutionally any common law or statutory trusts that existed before confederation; provinces could only use the land and resources they own pursuant to section 109 in accordance with these trusts. Courts have so far not accepted this argument. Valiante writes, "[f]or Section 109 to create any affirmative trust duties on the provinces, the courts would have to find general public rights relating to the water itself, something they have been most reluctant to do." But, the public right to the natural state of waters is a modern concept, one that did not exist before Confederation. The Canadian courts have not as yet been asked to rule on a public trust to water. So far courts have only recognized the public rights of navigation and fishing; the provinces do not have the competence to deal with these federal spheres of power.¹⁰⁹

Even if the courts recognized the existence of a public trust prior to Confederation, Section 109 might still be a weak guarantee of trust rights. In *A.G. Can. v. A.G. Ont.*¹¹⁰, the federal government wanted the Province of Ontario to pay Aboriginal people for land they had surrendered and in which Ontario gained the beneficial interest. The Privy Council doubted the framers meant section 109 to protect proper trust, as had been historically enforced by equity. Rather, the framers, by writing "trusts", meant formal legal duties (i.e. contracts) and likely intended this section to guarantee the fulfillment of outstanding contractual obligations

¹⁰⁷ See e.g. Valiante, *supra* note 81.

¹⁰⁸ *Constitution Act 1867*, s. 109.

¹⁰⁹ Hunt, *supra* note 39 at 168.

¹¹⁰ (1897), A.C. 199 (P.C.).

against the land and resources. In *Commanda*¹¹¹, a case before the Ontario Supreme Court, the defendant argued the 1850 Robinson Treaty protected his right to hunt, and that this right was a trust, ensured by section 109, and inviolable by provincial legislation. Green J. dismissed this argument, citing the Treaty's history. Land had been surrendered to the federal Crown before the Treaty was signed and title later passed to the Province of Ontario. Therefore, the Treaty itself never created the interest the Province enjoyed.

In both cases, the courts were unwilling to infer the existence of a public trust protected by section 109; they seemed prepared to acknowledge only more formal legal obligations, based on particular treaty language. Courts seem to refrain from acknowledging a constitutional public trust because of the legal formality of this decision. They have not yet acknowledged that any trusts, existing prior to 1867, have been constitutionally entrenched. It seems they will only give constitutionality to those rights that are extremely clear and certain and that create obvious expectations. To do otherwise would be to infringe too far and, more importantly, too permanently, into private property rights. But since the establishment of the Canadian Charter of Rights and Freedoms, enshrining the right to security of the person yet failing to entrench private property rights, Canadian courts may be more willing to strike a better balance between public expectations in the commons now and for generations yet to come and, individual economic rights to private property.

More fundamentally, the rule of law's values of certainty and clarity must be considered. Given the rule of law favours certainty and clarity over unclear law, the Attorney General and/or other public interest group might wish to seek a Declaration from the Ontario courts that set out the legal authority of the province to transfer ownership of local water systems to the private sector.

Trust law considerations

Despite similar legal histories, Canada and the United States have not given the public trust doctrine equal enthusiasm. In part, judicial characterization of trust doctrine has caused this disparity. While American courts have been willing to expand a historical concept that had always been separate from classical trust law, Canadian courts have tried to fit the public trust into a mould for which it was never intended. The Ontario Court of Appeal tried to do so in *Scarborough (City) v. R.E.F. Homes*.¹¹² Here, the Scarborough municipality claimed damages against the defendants who damaged many maple trees on city roads. When assessing damages, Lacourciere J. wrote for the majority "the municipality is, in a broad sense, a trustee of the environment for the benefit of the residents in the area of the road allowance and, indeed for the citizens of the community at large."¹¹³ Yet this judgment was for the "trustee", and only indirectly for the beneficiary -- the public trust doctrine is an action for the beneficiary. Confusing the two makes weak law. Indeed, the public trust and trust law, while sharing common elements, are not the same doctrines. The two have separate legal sources, and even though they both speak of trust *res*, trustees, and

¹¹¹ (1939), 3 D.L.R. 635 (Ont. S.C.).

¹¹² *Scarborough (City) v. R.E.F. Homes Ltd.* (1979), 10 C.E.L.R. 40 (Ont. C.A.).

¹¹³ *Id.* at 41-42.

beneficiaries, further parallels should not be made.¹¹⁴ Otherwise, classical trust law will constrain the more flexible public trust doctrine. American courts have recognized this and developed each separately; Canadian courts have not.

In fact, confining the public trust doctrine in the scope of classical trust law inhibits the former's development. As Hunt writes, "there are grave substantive and procedural problems arising from the application of classical trust law in a public trust context."¹¹⁵ Traditionally, common law has not allowed the Crown to be a trustee. Recent Canadian law, however, has suggested that the Crown might be a trustee, though this admission remains unconfirmed.¹¹⁶ Next, limited remedies are available against the Crown that has breached its duty as a trustee. In *Henry v. The King*, the court stated of the Crown, "[w]here it is a trustee the court has no jurisdiction to impose an obligation upon it, or to declare that any such obligations exists, unless the statute gives jurisdiction and where the statute gives jurisdiction it is immaterial whether in the particular case the Crown is held to be a trustee or not." Moreover, the *Crown Liability Act* equates the Crown's liability with that of an individual where the claim against it is in torts. No sections authorize a claim against the Crown as trustee. The plaintiff must therefore found the claim in common law, a difficult task, according to *Henry*. The American courts, by maintaining a flexible public trust doctrine and keeping it separate from classical trust law, have avoided these procedural hurdles. Before the doctrine will grow in Canada, Canadian courts must do the same.

The Supreme Court of Canada decision in *Guerin* does not indicate the judiciary's willingness to do this, but it does show its loosening of classical trust law principles, a step perhaps toward a new doctrine. This case considered the Crown's fiduciary duty to an Indian Band who had surrendered some of its land to the Crown for lease to a golf club. Although the decision was split, the justices agreed the Crown had a fiduciary obligation to the Band that existed independently of section 18 of the *Indian Act*; it arose from the nature of aboriginal title, as recognized in *Calder v. Attorney General of British Columbia*. This title is a "personal and usufructary" right.¹¹⁷ In other words, "Indian Bands have a beneficial interest in their reserves and ... the Crown has a responsibility to protect that interest and make sure that any purpose to which reserve land is put will not interfere with it."¹¹⁸ The Crown holds reserve land in trust for Aboriginal people much as, in the American public trust doctrine, the state holds its resources in trust for the people. *Guerin* marks the Supreme Court's acceptance of a public trust, though in a different context.

Although *Guerin* applied to Aboriginal title rights, its principles might have broader application. The Court acknowledged this potential as it wrote, "[i]t is the nature of the relationship, not the specific category of actor involved that gives rise to the fiduciary duty. The categories of fiduciary, like those of negligence, should not be considered closed."¹¹⁹ The trust of the public trust doctrine shares some, but not all, qualities of the trust between

¹¹⁴ Hunt, *supra* note 39 at 179. See also E. Ryan, 'Public Trust and Distrust : The Theoretical Implications of the Public Trust Doctrine for Natural Resource Management' (Spring 2001) 31 *Env. L.* 477 at 478.

¹¹⁵ Hunt, *supra* note 39 at 178.

¹¹⁶ *Id.* at 177.

¹¹⁷ *St. Catherine's Milling and Lumber Co. v. The Queen* (1888).

¹¹⁸ *Guerin v. R.*, [1984] 2 S.C.R. 335.

¹¹⁹ *Id.* at 384.

the Crown and Aboriginal people. Both place the crown as trustee. Both protect a beneficiary's use of a heavily regulated environment. Both protect future generations of beneficiaries. Finally, both exist regardless of legislative or constitutional entrenchment. Because it resembles the relationship between the Crown and Aboriginal people, the public trust doctrine might fit into an the courts' expanded category of fiduciaries. However, squeezing the public trust doctrine into the scope of trust law -- or even Aboriginal trust law - - does not afford environmentalists a powerful weapon. It still constrains a flexible doctrine in trust law principles that, despite the court's broadening of them, are more rigid. Moreover, since *Guerin* was decided, courts have not applied its fiduciary principles expansively. So while *Guerin* opened the door for the public trust doctrine in Canada, that doorway leads to traditional trust law, a narrow room with four corners and no windows to the environment.

4.2 Applying the Public Trust to the Bills

Canadian courts have not so far established a public trust doctrine, nor have they precluded its development. Important developments have emerged since *Green* that seem to recognize a modern approach to the public trust doctrine, one that includes concern for future generations and extends to the public interest in water-related environmental protection and ecological function. As private corporations increasingly seek to manage or exploit public resources, the public trust doctrine still has the potential to balance these proprietary interests with public expectations. The following will show how this may be done, using the example of Ontario's Bills 175 and 195. Recall that Bill 195 permits the Minister of Environment to transfer the ownership of local water systems as well as the operating licenses.¹²⁰

Both Bills define water services as water extraction, treatment and distribution. Because Bill 175 allows the Minister to delegate any of her authority to anyone in her discretion¹²¹, it could potentially allow the Minister to delegate her authority over water extraction to a private entity, privatizing a traditionally public resource. The public trust doctrine might be used to stop this privatization, for example. How far the trust would apply beyond the actual water resource and extend to water-related capital assets and services is an open question. The trust likely extends at least to the assets and operations necessary to maintain the means to the resource, in order to actually access and wisely use it, both now and in the future.

Pursuing a common law action in public trust to prevent water privatization might succeed. Given the nature of this most precious of all exhaustible natural resources, it seems that the effort is worth it. Canadian courts hesitate to change the common law.¹²² When they do, they prefer to make incremental changes. To create a new public trust action would be a large change, probably unacceptable to the courts – unacceptable, that is, unless Canadian courts distinguished *Green*, perhaps because the Charter and the EBR intervened, and/or adopted American and British precedent. This would require courts to take a broad, inclusive view of the common law, but might dispel their hesitation about changing it.

¹²⁰ See above, p. 11-12.

¹²¹ See Bill 175, Section 23.

¹²² *Friedmann Equity Developments Inc. v. Final Notes Ltd.*, [2000] 1 S.C.R. 862 at 873.

There is another problem with the common law argument. Bills 175 and 195 will become statutes; the private extraction of water, when authorized by legislation, could not be challenged at common law. But recall that the Ontario courts required certainty before finding the Ontario government had the lawful authority to privatize Hydro One, pursuant to the Electricity Act.¹²³ Yet a challenge might be brought before the Bills are passed. Further arguments could be made for the public trust doctrine, including an appeal to the courts to accept Canadian jurisprudential history in British decisions; or to accept the incremental protection of public rights, from protecting fishing and navigation to protecting against intangible public nuisances to adopting a public trust doctrine.

If courts hesitate to change the common law, they are especially cautious about constitutionally entrenching new rights; any case on section 35 Aboriginal rights shows this¹²⁴; and, for various reasons, the courts would accept section 35 rights long before they accept trust rights in section 109. Section 35 rights may have become prominent, but only after much political pressure. Section 109 and public trust doctrine have not as yet enjoyed this impetus. Section 35 has enjoyed a history of jurisprudence that section 109 so far does not. The former does not create expectations of Aboriginal rights in itself, but rather reflects the expectations of a long relationship between the Crown and Aboriginal people. Section 109 has so far not accompanied a history of the people's expectations of a public trust, yet the concept is quite intuitive. Recent polling regarding the City of Toronto's unsuccessful plans to create a water board demonstrate the overwhelming preference the public has towards remaining a public water system. Without the advantage of the political and historical expectations that section 35 enjoys, section 109 will not appear in much jurisprudence. Courts will hesitate to constitutionally entrench the public trust doctrine, as it would seriously and permanently infringe upon private property rights unless the public interest demands more interventions. Courts will fear marching straight into this provincial jurisdiction but might be persuaded that clear legislative intent is required to extinguish the public's expectations in common property, such as water resources, assets and services.

The most promising avenue to prevent privatization of public water would be to argue -- in addition to some constitutional recognition -- for the existence of a statutory public trust. Evidently, the *Green* decision is outdated and can be challenged on numerous grounds. Yet, a successful challenge still depends on the existence of a statute that entrusts the water for the people of Ontario in the government. The *Environmental Bill of Rights* is the closest example of this, yet it only contains in its Preamble and Purpose sections a vague substantive guarantee with limited procedural rights of enforcing the trust. Just like arguing for a common law or a constitutional public trust doctrine, asserting that a statute protects the trust requires the courts to adopt a progressive interpretation of Canadian law. The courts must replant the doctrine in Canadian jurisprudence.

¹²³ Globe and Mail, p. 1, Province Loses Hydro One Appeal: "The ruling in April by Mr. Justice Arthur Gans of the Ontario Superior Court that the government had no authority to proceed with the \$5.5-billion sale under the Electricity Act forced the government of Premier Ernie Eves to change its plans on privatization.

¹²⁴ See e.g. *R. v. Marshall*, *R. v. Van der Peet*, *R. v. Delgamuukw*.

The public trust doctrine has become an important tool for environmental protection. American courts have taken from the doctrine's historical roots a commitment to preserving public expectations. In the U.S., case law, legislation, and state constitutions have heightened the public's expectations that public resources will be publicly managed; yet, more importantly, American courts have allowed these heightened expectations to influence their own decisions. Cases like *Central Illinois* and *National Audobon* show how American courts have favored public expectations over lesser proprietary rights. In a striking judgment that established a 50 000 acre protected preserve in Long Island, surrounded by a 50 000 acre managed growth area, Justice William Underwood stated, '[i]n enacting environmental mandates, we are merely discharging our obligation under the societal contract between 'Those who are dead, those who are living and those yet to be born'. (Edmund Burke) ... This generation's duty has been discharged merely by setting aside this land for future generations under the doctrine of the Public Trust.'¹²⁵ Using the public trust doctrine, The U.S. has balanced – even integrated – generations of public and private interests in natural resources, something Canadian courts have so far failed to do.

So, the Canadian history of the public trust doctrine must start fresh. It calls for an appeal to Canadian courts to adopt British common law and American precedents and follow more accurately its own legal tradition. Nearly twenty years have passed since the courts rejected the public trust in *Green*. In that time, Canadian courts have become more receptive to environmental arguments. People have come to expect a higher assurance that public resources will remain public, not only for economic, but also for recreational and aesthetic purposes, for generations to come. Courts and legislatures must acknowledge the public's heightened expectations and enshrine them in legal decisions and new legislation. Doing so could instill clarity and certainty in a doctrine and give it the force of the rule of law. Only then will it become a powerful tool for environmental protection. The sooner it does, the better, and now could be the time to retest the courts' reception of the public trust doctrine.

4.3 International Trade and Investor State Obligations Triggered

If the Bills do proceed, a number of trade and investor-state dispute mechanisms are triggered. NAFTA contains several provisions that specifically apply to state enterprises and monopolies, both public and private. It is far from clear whether or not a public entity providing water as a service to consumers, such as a municipal service board, can any longer be considered a public or state enterprise when private-public partnerships or out-right privatization develops. As Case Study #1 made clear, when a NAFTA party designates a new public monopoly, as of January 1994, it must "act solely in accordance with commercial considerations in its purchase or sale of the monopoly good or service in the relevant market."¹²⁶ In other words, if a governance change is made at the provincial level of government that mandates private partnerships in or permits private ownership of local water systems, national treatment obligations and non-discriminatory access for all NAFTA service providers and investors must be ensured.

¹²⁵ *W.J.F. Realty Corporation and Reed Rubin v. The State of New York* (New York Supreme Court).

¹²⁶ NAFTA Article 1502.3 and note: Commercial considerations are defined as "consistent with normal business practices of privately-held enterprises," Article 1505.

Also NAFTA specifies that state enterprises and monopolies may be maintained and new ones designated, provided they act in a manner consistent with NAFTA's investment and services rules, opening up the likely possibility of investor-state disputes over future environmental protection standards.¹²⁷ Indeed the NAFTA facilitates privatization by requiring that new state enterprises be based on commercial considerations alone.

4.3.1 Markets, Conservation and Sustainability

Indeed, there are alternatives to private water systems. There are solid reasons why some resources such as water are considered inalienable and held in trust and why some public duties are considered non-delegable. Importantly, the trend towards privatization is in many ways antithetical to conservation. In a market, private ownership and extraction of the natural resources is done by the few, to be sold to the many for profit by keeping the price up, provided that resources are scarce. Sustainability goes against the private sector water interests that want to keep it scarce and expensive to supply, instead of supplying from conservation or recycling. Sustainability tends to distribute resources equitably, based on the long term, and in a consumer-based economy this will increase abundance and reduce scarcity. A sustainable water plan will be a challenge in a consumer-based economy because it will tend to proportionately drive profits down. This conflict may explain why new, sustainable technology is often kept out of the mainstream. Consider energy companies that prefer to give you aero plan points, rather than efficient light bulbs!

4.3.2 Excessive Water Extraction

Many local initiatives such as the retention of rainfall would increase water supply and watercourse stability to an extent that greatly increases groundwater supplies, the dilution of polluted runoff and sewage effluent.¹²⁸ But the private water sector prefers to focus on the expansion of water transfer systems, centralized distribution networks and urban sprawl rather than conservation. These steps are aimed at locking a majority of the public into dependence on centralized supplies. This private sector trend has progressed so quietly it has not attracted the attention of critics able to recognize the absurdity of piping recycled sewage effluent from rivers to homes whose roofs shed more "pure" water than the household uses. The centralization of water supply parallels the efforts of the electric industry to lock the public into debt for huge new generating facilities before it became obvious that home generation units can provide cheaper, cleaner and more reliable electricity.

Some of the competing uses of water may not be high in the priorities of managers in government, and even less in private hands: improving biodiversity, reserves and national parks, science and research, environmental and coastal protection, keeping rivers running and healthy. Generally speaking, preference for public control of the development, allocation and

¹²⁷ Article 1503, and see Case Study #1.

¹²⁸ In addition, rebating on water bills is possible according to how well consumers build the simple, inexpensive structures that could guide water into the groundwater beneath them. Rather than penalizing people for water usage, would it not be better to see most homes proudly displaying a "Rainwater Conserving Home" plaque that means they replenish groundwater supplies, reduce flooding and eliminate polluted runoff from their homesite? See Marple at <jesl@carolina.net>, a <waterforum@egroups.com> enthusiast.

testing of water resources derives from a perception that managers shielded by a corporate structure are more likely to encourage cutting corners, gambling with slim margins of safety, and unnecessary expansion than public servants whose careers are at stake and who are more accessible to concerned citizens. The building and maintenance of a local community role in developing and monitoring sustainable water plans and project development and services is a central duty of governments that holds freshwater in public trust for this and future generations. Justice O'Connor found that the provision of safe drinking water was possible within the context of a public system. Contrary to claims otherwise, Bills 175 and 195 are not compatible with the more thoughtful Walkerton recommendations.

5.0 Conclusion

Based upon the risks that the Walkerton tragedy made clear and almost ten years of experience with NAFTA investor-state disputes, our preliminary findings indicate serious public interests in the most precious of all exhaustible natural resources -- water -- are at stake at the provincial level of government, requiring more public accountability, not less.

We recommend that the provincial decision to restructure/privatize the public water systems be delayed until after the Attorney General examines the scope of the public trust doctrine in Ontario as well as the trade and investors' rights implications should both Bills become law, and based upon informed public consultations and debate, during the upcoming elections.

Until the public accountability gap and the trade and constitutional concerns are adequately addressed, with due regard to the public and national interests at stake, the current provincial Bills are a significant departure from the recommendations of Justice O'Connor in the Walkerton Inquiry and pose significant risks to environmental protection, ecological function and the public interest now and for generations yet to come.

6.0 References

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